

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEBRA A. MOORE)	
Claimant)	
)	
VS.)	
)	
ALL SAINTS HOME CARE INC.)	
Respondent)	Docket No. 1,035,800
)	
AND)	
)	
TECHNOLOGY INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 1, 2007, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Bart E. Eisfelder, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant was entitled to temporary total disability benefits beginning September 5, 2007, and continuing until she is released to substantial and gainful employment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 25, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends the ALJ exceeded her jurisdiction by awarding temporary total disability benefits against the overwhelming weight of evidence.

Claimant argues that the Board does not have jurisdiction over the issue of whether claimant is entitled to temporary total disability benefits.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over the issue in this appeal?

(2) If so, did the ALJ exceed her jurisdiction in finding that claimant is entitled to temporary total disability benefits?

FINDINGS OF FACT

Claimant, a home health care provider, was injured on June 26, 2007, when she slipped on a wet floor and fell. She injured her right knee and low back. She was paid temporary total disability benefits after her injury, but those benefits were stopped as of September 5, 2007. She has been released to light duty work with restrictions, but respondent has not offered her accommodated work within her restrictions. Claimant had dual employment with another home health care agency, and that agency has also refused to allow her to return to work as long as she has restrictions. Claimant has called other agencies looking for work and has been unable to find employment.

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the

proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,¹ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.²

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁴

ANALYSIS AND CONCLUSION

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Also, whether claimant is temporarily and totally disabled is not one of the issues listed in K.S.A. 44-534a(a)(2) that are deemed to be jurisdictional. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁵ Accordingly, respondent's appeal is dismissed. The respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2).

¹ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

² See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

³ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁴ K.S.A. 2006 Supp. 44-555c(k).

⁵ *Supra* note 2.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the respondent's appeal is dismissed and the Order of Administrative Law Judge Nelsonna Potts Barnes dated November 1, 2007, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of December, 2007.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Bart E. Eisfelder, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge